(3)

No. 06-1187

In the Supreme Court of the United States

D. PHILIP VEITCH, PETITIONER

v.

DONALD C. WINTER, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed for lack of standing petitioner's constitutional challenge to the conditions of his employment in the United States Navy Chaplaincy Corps and his request for declaratory and injunctive relief, where petitioner had voluntarily resigned from the Navy, the evidence failed to support his claim of constructive discharge, and the Navy acted reasonably in denying his request to withdraw his resignation due to his repeated acts of insubordination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 471 F.3d 124. The opinion of the district court (Pet. App. A24-A58) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 28, 2006. The petition for a writ of certiorari was filed on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an ordained minister in the Reformed Episcopal Church, joined the Chaplain Corps of the United States Navy in 1987 and served as a commissioned officer from June 1987 until September 2000. Pet. App. A2, A25. While stationed at the Naval Support

Activity at Naples, Italy, petitioner's immediate supervisor was Captain Ronald Buchmiller and his commanding officer was Captain John J. Coyne. *Id.* at A2-A3, A26.

Disagreements developed between Buchmiller and petitioner over petitioner's chaplaincy activities, including his failure to provide chaplaincy services in a manner that was consistent with the Navy's need to serve individuals from a range of religious backgrounds and his delivery of sermons that were "derogatory toward other faiths." Pet. App. A3. As part of the disagreement, petitioner sent "rather caustic emails" to his superior officer, Captain Buchmiller. *Ibid.*

Petitioner filed an Equal Employment Opportunity (EEO) complaint alleging that Captain Buchmiller's criticisms of his behavior constituted religious harassment. The investigating officer, Commander Zoeller, found that petitioner's "allegation of religious discrimination was unsubstantiated." Pet. App. A3. Petitioner "concede[d]" that, after November 1998, Buchmiller "neither mentioned" their theological disagreement over a doctrine known as "Sola Scriptura" nor "ever raised problems with any of [petitioner]'s sermons." *Id.* at A32. Petitioner did not seek further review of the Zoeller Report or its dismissal of his EEO complaint.

In January 1999, petitioner resumed sending improper emails to Buchmiller and, the next month, announced his refusal to "perform any collateral duties that involved working with Captain Buchmiller" or another Navy chaplain. Pet. App. A33. That same month, petitioner emailed a "four-page broadside attack on Buchmiller's command and character." *Id.* at A4. Petitioner conceded that some of his emails to Buchmiller could be considered "disrespectful." *Id.* at A34. The emails led Captain Coyne to seek non-judicial punish-

ment in the form of a Captain's Mast, see 10 U.S.C. 815, charging petitioner with "disrespect towards a superior commissioned officer," and demonstrating "marked disdain, insolence, and contempt" toward a superior, in violation of Article 89 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 889. See Pet. App. A35. Petitioner was also charged with "failure to go to appointed place of duty" for having missed four staff meetings without justification, in violation of Article 86 of the UCMJ, 10 U.S.C. 886. Pet. App. A4, A35.

After consulting a Navy attorney, petitioner refused nonjudicial punishment. Coyne then pursued the same charges through a court martial. Pet. App. A35. At that point, petitioner chose to resign to avoid the court martial. *Id.* at A4, A35-A36, A49. Coyne then dropped the court-martial charges and issued petitioner a Nonpunitive Letter of Caution. *Id.* at A4.

In April 1999, petitioner requested that the Department of Defense Inspector General investigate whether Buchmiller and Coyne had retaliated against him for filing his EEO complaint and probe the circumstances surrounding his resignation. Pet. App. A4. When the Navy Inspector General agreed to investigate the complaint, petitioner requested permission to withdraw his resignation. The Navy initially denied that request, but then suspended the resignation orders pending completion of the Inspector General study. *Id.* at A4-A5. In May 2000, the Inspector General issued a report that concluded that petitioner's "allegations of reprisal were unsupported," *id.* at A5, and that petitioner's "disciplinary problems * * * resulted from his own misconduct," 1 C.A. App. 517. In September 2000, petitioner was separated from the Navy. Pet. App. A5.

Three months after his separation, petitioner filed suit against the Navy and several of its officers seeking relief for alleged violations of his First Amendment rights to free speech and the free exercise of religion, the Establishment Clause, the Fifth Amendment, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* See Pet. App. A5. The amended complaint seeks a declaratory judgment that the defendants violated petitioner's constitutional rights, an injunction "voiding or rescinding plaintiff's illegal separation," and an order directing the Navy to prevent future alleged religious discrimination in the Chaplaincy Corps. 1 C.A. App. 38-40.[1]

The district court granted summary judgment for the defendants. Pet. App. A24-A58. The court first held that petitioner failed to establish a basis for his allegation that he was constructively discharged from the Navy. *Id.* at A44-A55. The court concluded that petitioner did not identify "a triable issue of hostile work environment," because he identified no facts that "point to 'intolerable' work conditions that would force a reasonable person to resign." *Id.* at A45. The court also found no factual basis for petitioner's allegation that theological differences underlay the disciplinary charges brought against him, noting that the "evidence on the record * * * abundantly shows that" the charges were not based on "doctrinal grounds." *Id.* at A47. The court explained that "[t]he record shows that Captain Buchmiller criticized [petitioner]'s sermons for denigrating other chaplains and did not instruct or direct

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[1] The amended complaint did not include any claim for money damages, beyond a claim for back pay, which has since been resolved and is no longer at issue in the case. See Pet. App. A38.

[petitioner] to 'preach pluralism' or any other doctrine." *Id.* at A48.

In addition, the court noted that petitioner "admitted that his decision to resign was motivated by his desire to avoid the court-martial proceeding," and further held that he had two "reasonable alternatives" to resignation—the Captain's Mast or the court martial—so that resignation was not the only reasonable course of action left to him. Pet. App. A49-A50.

With respect to the Navy's decision not to permit him to withdraw his resignation, the court held that the Navy's action was not arbitrary, capricious, or otherwise in violation of the law. The court noted that the Navy reasonably withheld action pending the Inspector General's investigation and denied withdrawal only after that report found that his "disciplinary problems . . . resulted from his own misconduct." Pet. App. A52. The court further noted that the Inspector General's investigation was fairly conducted, and petitioner did not demonstrate that the Inspector General's findings "were contrary to law." *Id.* at A54. Beyond that, the court explained, petitioner had failed to exhaust his administrative remedies because he could have sought relief before the Board of Correction of Naval Records and could have applied for correction of his military records pursuant to 10 U.S.C. 1034(f). Pet. App. A54 n.13.

Finally, the court held that, because petitioner's resignation was voluntary, petitioner lacked standing to seek declaratory and injunctive relief against the Navy's practices and policies within the chaplaincy program. Noting that petitioner "is no longer in the Navy because of his voluntary resignation," the district court held that petitioner "is not facing any 'real and immediate' injury as the result of the challenged official conduct." Pet.

App. A56 (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)).

3. The court of appeals affirmed. Pet. App. A1-A23. Assuming without deciding the existence of a cause of action for constructive discharge from the military, *id.* at A6-A7, the court of appeals affirmed the district court's conclusion that petitioner had failed to adduce facts to support his constructive discharge claim. With respect to his reliance on Commander Zoeller's report dismissing petitioner's EEO complaint, the court noted that the report "in no sense punished or threatened him; it simply rejected his [EEO] Complaint," *id.* at A8, and that it could "hardly be claimed that the Zoeller Report left [petitioner] with no practical alternative but resignation," *id.* at A9. Moreover, the court noted, petitioner "could have appealed the results of Zoeller's investigation, but chose not to do so." *Ibid.*

With respect to petitioner's argument that the court-martial charges compelled his resignation, the court explained that "[a] court-martialed serviceman or woman has a congressionally enacted process of military appeals by which to contest allegedly unlawful charges," but petitioner "neglected to exhaust [those] military court remedies." Pet. App. A10. The court likewise rejected petitioner's assertion of a hostile work environment, agreeing with the district court that, "viewing the record in the light most favorable to [petitioner], his claims fail to make out a hostile work environment as a matter of law." *Id.* at A12. The court held, in particular, that petitioner failed to allege conduct "sufficiently 'severe and pervasive' to create an aggravated work environment in which an employee had no choice but to resign." *Id.* at A14.

Finally, the court of appeals agreed with the district court that the record provides "no grounds to conclude that the Navy acted unreasonably in refusing [petitioner's] withdrawal request" and, instead, establishes that petitioner's "disciplinary troubles were the result of his own misconduct." Pet. App. A16. Because the record established that he resigned voluntarily, the court held that petitioner lacked standing to pursue his constitutional challenges to the Navy's chaplaincy program. *Id.* at A15.

Judge Rogers concurred. Pet. App. A17-A23. She agreed that, having voluntarily resigned from the Navy, petitioner lacked standing to bring his claim for reinstatement or his equitable claims regarding the conditions of his former employment. *Id.* at A17. She also explained that petitioner failed to prove either that the employment discrimination he alleges "required him to be disrespectful in violation of the Uniform Code of Military Justice," or that "the Captain's Mast or court-martial proceedings would have been so unfair so as to force his resignation." *Id.* at A21.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioner's claims of retaliatory discharge and religious discrimination are fact-bound and have been rebuffed at every level of administrative and judicial review. They do not warrant further review in this Court.

Petitioner contends (Pet. 10-16) that this Court should grant review because the Navy purportedly engaged in "gross governmental misconduct" in allegedly

requiring that he "preach pluralism." Pet. 11. That contention does not merit review for at least four reasons.

First, as the court of appeals held (Pet. App. A15), petitioner lacks standing to challenge the Navy's chaplaincy policies because he voluntarily resigned from the Navy and is not part of the chaplaincy program. "[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) (quotation marks and citation omitted). The Court accordingly lacks jurisdiction to review the policies that petitioner challenges.

Second, petitioner failed to exhaust his administrative remedies. Pet. App. A10, A54 n.13. Petitioner could have raised each of his claims concerning the conditions of his employment with the Navy as a defense in his Captain's Mast or court-martial proceeding. See *Manual for Courts-Martial, United States* ¶ 13.c.(5) (2005 ed.) ("A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89."). Furthermore, if convicted, petitioner could have sought review by the court-martial's convening authority and, following that, by the Navy Judge Advocate General. See 10 U.S.C. 859-867. In addition, in cases involving dismissal or discharge, a service member has a right of appeal to the United States Navy-Marine Corps Court of Criminal Appeals

and, by petition, to the United States Court of Appeals for the Armed Forces. *Ibid.*[2]

Allowing petitioner's claim to go forward would circumvent the administrative appeals process that Congress specifically designed for the resolution of employment disputes within the military. See Pet. App. A10-A11; cf. *Parisi* v. *Davidson*, 405 U.S. 34, 41-42 (1972) (exhaustion requirement applies to courts-martial when the accused could gain complete relief before such tribunals).

Third, the alleged misconduct had nothing to do with petitioner's voluntary resignation. As the district court explained:

> The record shows that Captain Buchmiller criticized [petitioner]'s sermons for denigrating other chaplains and did not instruct or direct [petitioner] to "preach pluralism" or any other doctrine. In fact, this inept phrase appeared in the fitness report completed by Captain Coyne *after* he learned about the e-mail correspondence between [petitioner] and Captain Buchmiller and decided that [petitioner] should be disciplined for his disrespectful demeanor.

Pet. App. A48.

The district court, the court of appeals, and the Navy Inspector General have all concluded that petitioner failed to provide any sound factual basis for his allegations that the disciplinary proceedings directed against him were the product of theological discrimination or improper retaliation. Each has independently determined that the record clearly establishes that petitioner's disciplinary problems were the result of his own

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[2] Decisions of the Court of Appeals for the Armed Forces can be reviewed by this Court. 28 U.S.C. 1259.

inappropriate and disrespectful conduct toward a superior officer. Pet. App. A5, A14-A15, A21, A48. There is no reason for this Court to revisit, much less upset, those unassailable and fact-bound determinations.[3]

Fourth, petitioner's claims of unconstitutional conduct are fact-specific and record-bound and thus do not present any question that merits this Court's exercise of its certiorari jurisdiction. There is no conflict in the circuits on the standing, exhaustion, or constructive discharge claims that petitioner asserts. Quite the opposite, the Ninth Circuit recently dismissed a similar case

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[3] In any event, the Navy's policies fully comport with the Constitution. The *Chaplains Manual* makes clear that a chaplain is free to preach the tenets of his or her faith, but must treat other chaplains and military personnel with "mutual respect" and a spirit of "cooper[ation]," given the unique demands of Navy service. See U.S. Navy, *Chaplains Manual* § 1202(5); 2 C.A. App. 721.

> The religious context of the Navy, like that of American society at large, is one of religious pluralism, in which independent churches and religious bodies coexist in mutual respect. . Because of the impracticality of providing clergy of every faith or denomination in every ship or station, the Navy and the churches of America have evolved jointly a pattern of cooperative ministry. The principle of cooperative ministry places on every chaplain the obligation to:
>
> a. Make provision for meeting the religious needs of those in command who are adherents of other churches.
>
> b. Cooperate with other chaplains and commands in meeting the religious needs of members of the chaplain's own faith group.

Chaplain's Manual, *supra*, § 1202(5); see *Katcoff* v. *Marsh*, 755 F.2d 223, 226 (2d Cir. 1985) (explaining that, because of the unique demands of military service, military chaplains must function in a "pluralistic military community").

on the ground that a plaintiff who had left the Navy "has no standing to pursue his claims that involve generalized critiques of the Navy's management of the Chaplain Corps." *Wilkins* v. *United States*, No. 05-56109, 2007 WL 1455012, at *1 (May 18, 2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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